

DBE COMPLIANCE: MONITORING AND ENFORCEMENT

Hawaii Department of Transportation
Disadvantaged Business Enterprise Program
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OBJECTIVES

- ▶ Learn what HDOT's responsibilities are for monitoring performance of program participants.
- ▶ Find out what constitutes good faith efforts.
- ▶ Determine what "prompt" means in the phrase prompt payment to subcontractors.
- ▶ Understand when the Prompt Payment form is necessary.
- ▶ Learn what is required in a commercially useful function review.
- ▶ Determine what compliance procedures are required for HDOT and its subrecipients.

WHAT MECHANISMS MUST BE IN PLACE?

- ▶ HDOT must have a mechanism to monitor compliance by program participants and stakeholders such as subrecipients, contractors, and DBEs.
- ▶ HDOT must ensure that work committed to DBEs are performed by DBEs.
- ▶ There must be a mechanism to provide for a running tally of DBE attainments (actual payments to DBEs).

The image features abstract green geometric shapes on the left and right sides. On the left, a single green triangle points downwards. On the right, a complex arrangement of overlapping green triangles and polygons in various shades of green is shown. A thin white line extends from the bottom left towards the right side of the composition.

GOOD FAITH EFFORTS

GOOD FAITH EFFORTS - NOT NEW!

- ▶ Final Rule provides examples of some of the actions contractors can take to show GFE.
- ▶ Bidders cannot reject a DBE because it is not the low bidder or is unable to find a replacement DBE at the original price.
- ▶ Recipients must review the performance of other bidders in meeting the contract goal.

GOOD FAITH EFFORTS - FACTORS TO CONSIDER

- ▶ Did Bidder/Offeror submit required information?
- ▶ Solicited through all reasonable means?
- ▶ Broke apart portions of work to be performed by UDBEs?
- ▶ Provided information on plans and specs?
- ▶ Negotiated in good faith with UDBEs?
- ▶ Did not rely solely on price?

GOOD FAITH EFFORTS - FACTORS TO CONSIDER

- ▶ Rejected UDBE as unqualified without sound reason?
- ▶ Assisted in obtaining bonding or financing?
- ▶ Assisted with getting equipment or supplies?
- ▶ Asked for advice from minority or women organizations?
- ▶ Did other bidders/offerors meet the goal?

GOOD FAITH EFFORTS - RECENT CHANGES

- ▶ Prior to the final rule, HDOT did not request copies of quotes for all subcontractors when a contract goal is not met, and a non-UDBE is selected over a UDBE.
- ▶ Prior to the final rule, HDOT did not request written documentation of the bidder's/offeree's commitment to use UDBEs
- ▶ Prime contractors have 7 days after HDOT approves replacing a UDBE to submit documentation of good faith efforts



PROMPT PAYMENT

PROMPT PAYMENT MECHANISM (§26.29)

- ▶ This provision requires prime contractors to pay their subcontractors within 30 days. HDOT and its subrecipients requires subcontractors to be paid within 10 days.



PROMPT PAYMENT – 3 OPTIONS FOR PAYMENT OF RETAINAGE

1. Not hold retainage on prime contractors and prohibit them from holding retainage on subcontractors.
2. Not hold retainage on prime contractors and allow them to hold retainage on their subcontractors until work is satisfactorily completed.
3. Withhold retainage on prime contractors, and pay retainage based on incremental acceptances of portions of the work. Prime contractors pay their subcontractors after satisfactory completion of accepted work.

COMMERCIALLY USEFUL FUNCTION



CUF VIDEO

- ▶ <http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?id=86>

DEFINITION OF CUF

“Responsible for the execution of the work of the contract or a distinct element of the work.... by actually performing, managing, and supervising the work involved.”

RESPONSIBILITY AND OVERSIGHT

- ▶ The prime contractor is responsible for ensuring that the DBE companies perform a commercially useful function.
- ▶ The HDOT and subrecipients oversee the prime contractors and monitors CUF through a review or inspection.
- ▶ As part of the monitoring process, HDOT and subrecipients shall use the CUF Checklist.


OPERATIONS TO BE CONSIDERED

- ▶ Materials
- ▶ Management/Supervision
- ▶ Workforce/Employees
- ▶ Performance
- ▶ Equipment

WHY DO WE NEED TO KNOW WHAT A CUF IS?

The only way a prime contractor can receive credit towards a DBE contract goal, is if the DBEs perform a commercially useful function.





COMPLIANCE PROCEDURES

COMPLIANCE PROCEDURES

If HDOT or its subrecipients fail to comply with the DBE regulations, we may be subject to formal actions under §26.103 or §26.105 or appropriate sanctions by the concerned operating administration, such as the suspension or termination of Federal funds.



ENFORCEMENT ACTIONS - FHWA AND FTA PROGRAMS

- ▶ Noncompliance Complaints
- ▶ Compliance Reviews
- ▶ Reasonable Cause
- ▶ Conciliation

NONCOMPLIANCE COMPLAINTS

- ▶ Any person who believes that HDOT and/or its subrecipients have failed to comply with the DBE regulations may file a complaint within 180 days of the alleged violation.
- ▶ Complaints may be filed with the FHWA or FTA Office of Civil Rights, which may extend the filing period in the “interest of justice.”

COMPLIANCE REVIEWS

- ▶ At any time FHWA or FTA may conduct a compliance review.
- ▶ This includes reviews of paperwork, and on-site reviews.
- ▶ Usually reviews are done in response to a complaint.

REASONABLE CAUSE NOTICE

- ▶ If it appears, from the investigation of a complaint or the results of a compliance review, that HDOT is in noncompliance with the DBE regulations, a written notice is sent to inform us that there is reasonable cause to find us in noncompliance.
- ▶ The notice states the reasons for this finding and directs HDOT to reply within 30 days to request conciliation.

CONCILIATION

- ▶ The appropriate USDOT official shall pursue conciliation for at least 30 but not more than 120 days from the date of the conciliation request.
- ▶ Once a conciliation agreement is signed, HDOT is considered to be in compliance and the matter is considered closed.
- ▶ The concerned operating administration will continue to monitor HDOT to ensure compliance.

ENFORCEMENT ACTIONS – FAA PROGRAMS

- ▶ (a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.
- ▶ (b) The provisions of §26.103(b) and this section apply to enforcement actions in FAA programs. (*i.e. Compliance Reviews*)
- ▶ (c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

Questions?

